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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1572

UNITED STATES OF AMERICA, PETITIONER

vs.

TED R. GRAYSON

ON PETITION FOR A WRIT OF CERTIORARI TOTHE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

John M. Humphrey, Esquire
23 West Third Street
Williamsport, PA 17701

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OPINIONS BELOW

The original judgment order of the panel (App. D, of Petition, 35a-36a) is not reported. The opinion of the panel on rehearing (App. A, of Petition, 1a-31a) is reported at 550 F. 2d 103.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question presented is adequately set forth in the Petition.

STATEMENT

Respondent has no disagreement with the Statement in the Petition. However, it is necessary to set forth certain additional facts concerning the trial in this case.

At trial, Respondent admitted walking off of the Allenwood Federal Camp on October 11, 1975, and admitted being apprehended two days later at his legal residence in New York City. The Respondent testified that he left Allenwood because of a well-founded fear of death or serious bodily harm. Specifically, Respondent testified that he had been gambling and became indebted to an inmate at Allenwood who began pressuring him for money. On October 11, 1977, this other inmate threatened the Respondent with a board which had a nail in the end of it. As a result of these threats and his belief that his life was in danger, Respondent fled the Allenwood Prison Camp that evening, October 11, 1977. See Transcript at p.p. 42-60. Apparently, this defense was the "complete fabrication without the slightest merit whatsoever," referred to by the Judge at sentencing.

On the issue of whether the Respondent could have taken steps other than leaving Allenwood to escape the alleged coercion and duress, he testified that he did not report the threats against him to the Allenwood authorities because there were no security facilities at Allenwood and because he was afraid that as an "informer" his safety would be even more injeopardy. See generally, Transcript at p.p. 76-77. Respondent further testified that

upon leaving Allenwood he went to New York rather than turning himself in at the Lewisburg Penitentiary because he knew that he would be apprehended at his residence in New York, and because he was afraid that he would be badly treated by the Lewisburg authorities because of his escapee status. See generally, Transcript at p. 85.

In his charge to the jury, the trial judge listed the four elements of the crime of escape under 18 U.S.C. Section 751(a), and stated to the jury:

> "There is no dispute in this case with respect to the first three elements. The Defendant admits that he was lawfully confined and that he left the Allenwood Prison Camp without permission. However the last element of the offense of escape with intent to avoid confinement is in dispute.
>
> In order to sustain its burden of proof in this case, the Government must prove beyond a reasonable doubt that the Defendant voluntarily departed from custody with an intent to avoid confinement.
>
> The Defendant has introduced evidence suggesting that any illegal acts which he may have committed were the result of coercion or compulsion or duress. Now compulsion or coercion or duress may provide a legal excuse for the crime charged in the indictment. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present and immediate and of such a nature as to induce a well-founded fear of impending death or serious bodily injury. And there must be no reasonable opportunity to avoid compulsion without committing the crime.
>
> If the evidence in the case should leave you with a reasonable doubt whether at the time and place of the alleged offense the Defendant Grayson acted willfully and voluntarily--that is to say whether the accused was forced in effect to commit the crime charged in the indictment by coercion or compulsion as just explained--then you should acquit the accused.
>
> Whether the Defendant had a reasonable opportunity to avoid the coercion or compulsion or duress without leaving Allenwood

Prison Camp depends upon whether he acted as an ordinary man would have acted under all the same circumstances; that is whether an ordinary man would have felt it necessary to leave the Allenwood Prison Camp when faced with the same degree of compulsion, coercion or duress as the Defendant was faced with in this case.

If you find that the Defendant was compelled to leave the Allenwood Federal Prison Camp but that after he left, he voluntarily decided to remain at large, you may find the Defendant guilty of escape." (Emphasis added). Transcript at p.p. 223-225.

ARGUMENT

In urging the Court to grant the Petition, Petitioner relies on two separate considerations as set forth in Supreme Court Rules 19: (1) that the issue here presented is a very important question of federal law since sentencing judges must know whether they may take into account in imposing sentence a belief that the Defendant gave false testimony during the trial, and (2) that there is a conflict between the Circuit Courts of Appeals on this issue.

Petitioner argues that the Third Circuit's decision in the instant case is in accord only with Scott v. United States, 419 F. 2d 264, 268-269 (C. A. D.C.), and that the following eight decisions are to the contrary: United States v. Nunn, 525 F. 2d 958 (C.A. 5); United States v. Hendrix, 505 F. 2d 1233 (C.A. 2), certiorari denied, 423 U.S. 897; Hess v. United States, 496 F. 2d 936, 939 (C.A. 8); United States v. Moore, 484 F. 2d 1284, 1287 (C.A. 4); United States v. Cluchette, 465 F. 2d 749, 754-755 (C.A. 9); United States v. Wallace, 418 F. 2d 876, 878 (C.A. 6), certiorari

denied, 397 U.S. 955; United States v. Levine, 372 F. 2d 70, 74 (C.A. 7), certiorari denied, 388 U.S. 916; Humes v. United States, 186 F. 2d 875 (C.A. 10).

In several of these cases, e.g., Cluchette, Wallace, Levine, and Humes, supra, the issue of whether the sentencing judge can consider the Defendant's alleged perjury at trial was decided in passing and with very little discussion or reasoning. In two of the cases, Hess and Moore, supra, the courts' decision were somewhat equivocal. While these decisions held that in the particular cases before the courts the judge did not err in considering the Defendant's alleged perjury, the courts went on to state that in the usual case it is better for the trial judge who suspects perjury to request an investigation and that thereafter, if the facts warrant, the United States Attorney may initiate prosecution for the separate and distinct crime. See, e.g., United States v. Moore, supra, 484 F. 2d at 1288.

Although the decisions contrary to the Third Circuit's decision in the case at bar are not as overwhelming as a reading of the Petition would indicat Respondent admits that there is a conflict between the circuits on the question here presented. Furthermore, Respondent admits that the issue in this case is an important question of federal law. Nevertheless, Respondent urges the Court to deny the Petition for the reason that this important question of federal law is clouded by the particular facts in this case.

Most of the Circuit Court cases cited by the Petition as holding that a sentencing judge may consider the alleged perjury of the Defendant do not

discuss the alleged perjured testimony. However, those cases which do discuss the perjury would indicate that the Defendant's testimony was inconsistent with the jury's finding of guilt. Thus, in United States v. Hendrix, 505 F. 2d 1233, 1237 (2d Cir. 1974), it is pointed out:

> "This was a case where the jury could not have convicted without being persuaded beyond a reasonable doubt that the appellant had lied deliberately and willfully. The trial judge concurred in that unanimous persuasion."

See also, Hess v. United States, supra; United States v. Wallace, supra. In the case at bar, Judge Rosenn's dissenting opinion firmly relied upon such a requirement:

> "As an additional safeguard to the defendant, I would require that the falsity of the defendant's testimony be necessarily established by the finding of guilt. There must be no possibility that the substantive law applied was such that the factfinder could have believed the defendant's testimony at the same time as it found him guilty. If, for example, a person charged with burglary testified that he burglarized out of hunger, the substantive criminal law is such that the factfinder could find the defendant guilty even as it finds his testimony wholly truthful. On the other hand, when a defendant testifies to an alibi, a finding of guilt would necessarily rest on a finding that his testimony was false. This additional safeguard thus minimizes the possibility of abuse. A review of the record in this case reveals that Judge Muir applied both these safeguards."

See Petition at App. A, p. 31a.

Although Judge Rosenn apparently found that the Respondent's testimony was inconsistent with the jury's finding of guilt, it is respectfully submitted that a review of the facts in this case would indicate the contrary. As set forth at pages 2 and 3 of this Brief, supra, the Respondent's testimony went

to the element of intent and raised the defense of coercion and duress. By Judge Muir's charge to the jury, supra, at p.p. 3-4, the jury was instructed that "there must be no reasonable opportunity to avoid compulsion without committing the crime" and was further instructed to find the Respondent guilty if the jury concluded that "the Defendant was compelled to leave the Allenwood Federal Prison Camp but that after he left, he voluntarily decided to remain at large ...." Thus, it is entirely within the relm of possibility that the jury believed Respondent's testimony that he left Allenwood because of the threats against him, but nevertheless found him guilty because the jury felt he should have sought protection from the Allenwood authorities rather than leaving the camp. Alternatively, the jury could have felt that the Respondent's leaving the camp because of the threats was reasonable, but that he voluntarily decided to remain at large since he went to his apartment in New York City for two days rather than immediately turning himself in to the proper authorities.

It is quite clear, then, that the Respondent's testimony at trial was not necessarily inconsistent with the jury's finding of guilt. Unlike the other cases which have been decided by other courts, this case presents a very significant factual question as to whether the Respondent in fact committed perjury and the trial judges basis for believing that he did. It is submitted that this situation clouds the question which Petitioner requests this Court to resolve. The resolution of this important question of federal law should

await the time when it is posed more clearly and without the troublesome factual circumstances presented in the case at bar. This Court has denied or withdrawn certiorari where an important federal issue, upon which there was a conflict in the circuits, was not clearly presented in the case before it. See, The Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959). As indicated by the number of decisions in the Circuit Courts of Appeals which have considered the question of whether a sentencing judge may consider the alleged perjury of the Defendant, this issue is very likely to be presented again soon, and presented without the difficult factual circumstances present in the case at bar.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

John M. Humphrey, Esquire
Attorney for Respondent

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.
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Index No.

IN THE SUPREME COURT OF THE UNITED STATES

RUFUS WESLEY,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE BY MAIL

RECEIVED

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th Street, New York, N.Y. 10024.

That on July 28, 19 77 deponent served the annexed Motion for Leave to Proceed in Forma Pauperis and Affidavit on the Solicitor General, Dept. of Justice attorney(s) for Respondent in this action at Dept. of Justice, Constitution Ave.& 10 St.N.W. Wash.D.C. 20530 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 28th day of July, 1977.

August De Fonse
The name signed must be printed beneath

AUGUST DE FONSE

GEORGE COHEN
Notary Public, State of New York
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No.

RUFUS WESLEY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ELEANOR JACKSON PIEL, being duly sworn, deposes and says:

1. I am the attorney for Rufus Wesley, the petitioner herein, and have served as his attorney pursuant to Court appointment under the Criminal Justice Act by reason of petitioner's indigency.

2. Petitioner is currently serving an eight year prison term in Atlanta, Georgia.

3. Because of poverty he is unable to pay the costs of this proceeding or to give security therefor.

4. Petitioner and his counsel believe that he is entitled to the redress he seeks.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No.

RUFUS WESLEY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Rufus Wesley, who is now held in a United States penitentiary at Atlanta, Georgia, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit without prepayment of costs and to proceed in forma pauperis. The affidavit of Eleanor Jackson Piel, attorney for petitioner, in support of the petition, is attached hereto.

ELEANOR JACKSON PIEL
Attorney for Petitioner
36 West 44th Street
New York, New York 10036

United States Court for the Southern District of New York:

(1) He was denied the right to exercise a peremptory challenge to any alternate juror and two such alternates participated in the deliberations;

(2) He was arrested by federal authorities in another jurisdiction and was absent involuntarily for three days of trial;

(3) During the jury deliberations a juror communicated with the trial judge out of the presence of petitioner and his counsel and a discussion was had concerning that juror's withdrawal from the deliberation.

6. The foregoing three issues involve a violation of federal constitutional rights basic to due process of law.

ELEANOR JACKSON PIEL

Sworn to before me this
26th day of July, 1977.

GEORGE COHEN
Notary Public, State of New York
No. 31-0342100
Qualified in New York County
Commission Expires March 30, 1979